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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, Individuals and Co-partners Doing Business Under the Name and Styles, "Dutch Paint Co.," and "Manning-Mitchell Paint Co.,"
Petitioners,

vs.

NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. DU PONT DE NEMOURS AND COMPANY, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above

entitled case on June 27, 1955, Petition for Rehearing denied on August 22, 1955.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the trial Court is unreported and appears at R. 1315 to 1319. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto unreported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 27, 1955. (R. 1806, Appendix C.) Rehearing was denied on August 22, 1955. (R. 1807.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

~~Either of the following:~~

1. Whether this Court's decision in *Bigelow v. R.K.O.*, 327 U.S. 251, is inapplicable to a manufacturing industry as the Court below held.

2. Whether or not under *Bigelow v. R.K.O.*, 327 U.S. 251, the fact of injury is established for submission to a jury upon the showing of (a) a right to have competition from respondents; (b) a violation of this right by respondents contrary to the antitrust laws; (c) a trade or business as to which the violation

would naturally and probably cause loss of earnings and as to which competitors have been allowed advantages denied to it by reason of the violation or whether plaintiff must affirmatively meet and explain away assumptions made from his historical business records that the business could not have prospered more than it did, absent the violation.[1]

3. Whether plaintiff, in a private antitrust action, must have affirmative proof that the increased costs of an inferior substitute commodity which it is forced to purchase by reason of a conspiracy were not passed off to its customers.[1]

4. Whether plaintiff, in a private antitrust action, must affirmatively prove that increased prices attributable to a price fixing combination as to commodities which are purchased by him for reprocessing were not passed off to its customers.[1]

5. Whether, assuming the fact of injury is proven by a plaintiff in a private antitrust action, but the proof as to the damage is conjectural, plaintiff is entitled to nominal damages and attorney fees.

6. Whether the Court below properly took all inferences from the evidence in the light most favorable to petitioners on review of a nonsuit ruling.

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[1]Petitioners, indeed, will urge that only by making inferences adverse to their case upon a review of a nonsuit could the Court conclude the evidence did not establish the proof required, but submit these questions as the decisive grounds of the Ninth Circuit's opinion.

STATUTE INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. Sec. 26. They are printed in Appendix A.

STATEMENT.

On February 20, 1950 petitioners filed a complaint against respondents for violating the antitrust laws. The complaint alleged that petitioners, in conspiracy with others, achieved monopoly power in violation of the antitrust laws over the manufacture and distribution of titanium pigments. (Tr. 22-24, 26-27.) The complaint further alleged that petitioners misused this monopoly power by (1) conspiring to fix prices on titanium pigments. (Tr. 23.) (2) Conspiring to fix uniform delivered price zoning systems. (Tr. 23.) (3) Conspiring to establish petitioners on a fixed arbitrary and illegal quota in their distribution of titanium pigments during a period of shortage while at the same time favoring themselves and historical customers, causing petitioners' competitive displacement. (Tr. 24, 26, 33.)

After 12 days of trial, petitioners were nonsuited by the trial Court on the ground that they had not proven the fact of injury, even assuming the existence of the conspiracies alleged in the complaint. (F.R.C.P. 41(b), 50(b).) On review the nonsuit ruling was upheld by the 9th Circuit Court of Appeals. (Appendix B, infra.) The Appellate Court also based its decision

on the ground that petitioners had not raised a prima facie case as to the fact of injury to their business, assuming proof of conspiracies alleged.

The evidence in the case established an agreement among respondents to control and regulate the distribution of titanium pigments to paint manufacturers who were veterans of World War II. (Tr. 1411, 1790, 1543, 1645, 1677, 1767, 919, 920, 740.) Respondents control between 80% to 90% of the nation's supply of titanium pigment. (Tr. 1373-1374.) Titanium pigment is an essential ingredient in the manufacture of most types of quality household and industrial type paints. It is the hider in paints. It has better hiding power and costs less than lithopone, an inferior substitute. (Tr. 920, 1144, 1655, 1657.) Titanium pigments were in short supply from the period 1942 to on or about December, 1948. (Tr. 899, 581, 729, 730, 902, 903, 1563, 1677.) Lithopone was also in short supply. (Tr. 66, 1732-1733, 211-212, 1087-1088, 1732.)

In 1943 the respondents adopted a quota method of allocating titanium pigments to its then customers. Each refused to sell titanium to new paint manufacturers. (Tr. 585-586, 729-730, 902-903.) An exception to selling to newcomers to the paint industry was made in 1946 following the Civilian Production Administration's issuance of Priority Regulation Number 28, which allowed veterans of World War II to obtain CC ratings for materials regulated by the C.P.A. (Tr. 1766.) No CC ratings were issued for titanium pigment to veterans by reason of an agreement among respondents to agree upon each furnishing approxi-

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 480

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, Individuals and Co-partners Doing Business Under the Name and Styles, "Dutch Paint Co." and "Manning-Mitchell Paint Co.,"
Petitioners,

vs.

NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. DU PONT DE NEMOURS AND COMPANY, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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mately 50% of 1 ton a month to a veteran. This agreement was claimed by respondents to be immune from attack since it was claimed to have been made in the presence of an official of the Civilian Production Administration at an industry advisory committee meeting in February, 1946. (Tr. 1767.) In 1947 the C.P.A. terminated any authority over the distribution of titanium pigment (Tr. 1779), but respondents continued to limit veteran manufacturers to 1 ton a month per veteran, not to exceed a double veteran quota. (Tr. 919, 740, 202, 211-212.)

Veteran accounts were held to this quota in spite of expanding commitments of titanium and distribution plans by respondents which gave to favored accounts thousands of tons of titanium pigments over and above their 1942 base quotas. (Tr. 1746-1747, 1653, 1501-1503.) The most favored accounts of respondents were their own paint manufacturing subsidiaries.

Veteran paint manufacturers, such as petitioners, were held to the same quota as agreed upon by respondents in 1946 in the years 1947 and 1948 whereas other companies were given expanding commitments of titanium pigments in the same period. (Tr. 1677, 920, 1453, 1455, 1457, 1501.)

Petitioners claimed that they were: (1) entitled to receive CC ratings from the C.P.A. and this was defeated by an unlawful agreement of the respondents. (2) They were entitled to competition between respondents in the distribution of titanium pigments in 1947 and 1948, and that this right was defeated by

agreement. (3) They would have received more titanium pigment but for the agreement. There was presented evidence in this regard of the continuous requests of local salesmen of du Pont to National Headquarters to supply petitioners with more titanium, since in their opinion they were a deserving account. (Tr. 1401-1409.) Du Pont's own salesmen stated that the veteran quota limited the inevitable expansion of petitioners. (Tr. 1403.)

In the years 1946, 1947 and 1948, petitioners received a quota of only 2 tons a month of titanium, a double veteran's quota, from respondents. National Lead, on the other hand, supplied its paint factory in San Francisco, competitive to petitioners, with 17,000,000 lbs. of titanium pigment over and above its base quota in the three years involved. (Tr. 1658.)

Petitioners proved that respondents made price rises in the three years to uniform levels. They proved that the tight market in titanium pigments had broken by December, 1948 but that respondents raised prices in December, 1948 to an identical level and uniformly maintained this price rise throughout 1949 despite full warehouses and decreased production. (Tr. 1381-1394, 1395, 625-638, 1506, 663-664, 876, 901, 612, 893-894.)

Petitioners also proved respondents maintained uniform prices as part of a uniform delivered price zone system having substantially identical delivered price zones, identical differentials between zones and quantity differentials. This was so in spite of the fact that National Lead has its extended titanium manufac-

turing plant 900 miles closer to the West Coast than du Pont's. (Tr. 1381-1399, 409, 610-611, 1492, 1531, 638-640, 644, 888-889, 1492.)

EVIDENCE OF INJURY—LOSS OF PROFITS.

Petitioners, with two other naval officers, entered into the business in December, 1945 and requested titanium pigments from respondents. Each refused to sell them because they did not manufacture paint themselves and had arranged to toll out their formulas. (Tr. 938, 942-944, 946-947.) After purchasing a paint factory, The Dutch Paint Co., petitioners again requested titanium pigments and were placed on a double veteran quota of approximately 2 tons a month in 1946. (Tr. 960-975.) They were continued on this quota in 1947 and 1948. (Tr. 211-212, 1695, 1697, 1404-1406, 1501, 1653.) This caused their competitive displacement with respect to those accounts receiving ever expanding shipments of titanium in the same period of time. (Tr. 1515-1522, 1677, 1695-1697, 922-923, 1501-1502, 1653, 1746.)

Petitioners introduced a complete accounting study of their business activities. (Tr. 1417-1448.) They further presented analysis of their business on the basis of sales to particular types of customers (Tr. 1652, 976) and on the basis of sales and profits made from the manufacture of paint with titanium or substitute pigments without regard to the type of purchaser. (Tr. 1661-1662.) They further showed that the competitive paint factory of respondents had an almost

unlimited supply of titanium in the quota years. (Tr. 1670-1676, 1685, 1653, 1377-1379, 1525 and 1379, 105.) Thus in the free year 1949 respondents decreased titanium consumption (Tr. 1653, 1658, 1525, 1670, 1676) whereas petitioners increased titanium consumption. Based upon the increased ratio between the competitive plants of respondents achieved in the free year 1949 to the limited ratio in the quota years, petitioners calculated what their profits might have been had the free year ratio been constant during the quota years. (Tr. 1663 and 1673.)

The Court below however seized upon net profit figures calculated by respondents as ultimate proof that petitioners had not been injured. It assumed that if petitioners' net profits were ~~higher~~ lower in the free year 1949 than in the previous quota years, 1946, 1947, 1948, petitioners could not possibly have been injured. The calculations of respondents adopted by the Court below are printed at Appendix D herein. By assuming that the net profit figures of petitioners were higher in the free year 1949 than the quota years, the Court made two fundamental rulings: (1) that the total business activities of petitioners could not be separated between those activities which had to do with the processing of titanium pigments received from the respondents, and those activities having to do with dealings in the post war surplus market and the reprocessing of paints obtained from sources other than respondents. Thus petitioners established that in 1947 only 42% of their business was based on processing titanium pigments from respondents; 58% in

1948; but in 1949, 76% of their business was based upon processing titanium pigments received from respondents. (Tr. 1661-1662, 1433-1435, 1142-1151, 1652, 980-990, 1437-1438.) Petitioners contend therefore that on a Motion for Nonsuit the Court was required to accept the net profit figures set forth in Appendix E. (2) That the evidence showing that lithopone was used extensively in appellants' paints would not cause injury.

Petitioners could not operate on the amounts of titanium pigment allotted to them by respondents, but had to mix their paints both with titanium pigment and lithopone. (Tr. 982-984, 1142-1151, 1441.) This gave them hiding spread, but reduced the quality of their paints. (Tr. 1144, 1656-1657.) Large supplies of lithopone could not be purchased until 1948. (Tr. 1087-1088, 1443.) In 1948, with the purchase of 403,050 pounds of lithopone, petitioners were able to expand their trade sales business. But in 1949, when titanium pigment became available to petitioners, they reduced their purchases of lithopone to 400 pounds, and purchased 501,500 pounds of extended titanium pigments. (Tr. 1443, 1444.)

Thus the use of lithopone on a 1 to 1 ratio with titanium in 1946 and 1947 was made necessary by the fixed quota of titanium content allowed petitioners. In 1948 the ratio had to be increased to 4 pounds of lithopone to 3 pounds of titanium. (Tr. 982-984.) But in 1949, all paints were mixed with titanium.

By ruling that if the net profits of petitioners' total business activities were ~~higher~~ lower in 1949 than in each

year of the quota years, there could be no injury, the Court further ignored the following factors of injury:

(1) *Competitive Displacement.* The quota years contrasted to the year 1949 were years of free and easy sales of titanium pigments to paint manufacturers, whereas the year 1949 was a heavily competitive year. (Tr. 1133.) Clearly those supplied with discriminatory shipments of titanium pigments received an economic advantage over petitioners. (Tr. 1746-1747, 1653, 1501-1503, 1677.)

(2) *Capacity.* Petitioners established that the processing of paints nowhere reached their estimated capacity. (Tr. 1008-1011.)

Year	Estimated Capacity to Process Extended Titanium Pigment in Pounds, at Least (Tr. 1008-1011)	Actually Processed Extended Pigment (All Sources) (Tr. 1442)	Actually Processed Pure Pigment (All Sources) (Pltfs. Ex. 17, Tr. 1442)
1946	630,000	50,450	12,100
1947	960,000	112,455	22,000
1948	780,000	179,400	36,250

(3) *Sales.* Despite the concentration and effort expended by petitioners in the quota years, they, in fact, increased their sales in the free but more competitive year 1949. (Tr. 1662, 1433-1435, 1142-1152.) Consequently, if petitioners increased sales in a competitive year over their quota years, a jury could assume that plaintiffs' sales were depressed by reason of the veterans quota.

(4) *Consumption of Titanium Pigment.* Free of quota restrictions petitioners consumed approximately

330% more titanium in the free but more competitive year, 1949. Consequently a jury could infer that petitioners would have purchased and processed more titanium in the quota years but for the veterans quota. (Tr. 1442.)

(5) *Gross Profits on Materials Handled.* Such gross profits were higher in the free year 1949 than in the quota years. (Tr. 1661, 1195.) Clearly a jury could find that petitioners had a paint manufacturing plant in operation which could have operated at greatly increased capacity, and the exact increases in overhead cost were established in the record. (Tr. 1418, 1421, 1424.)

(6) *Statements of Respondent's Salesmen.* .Du Pont salesmen stated that the veteran quota limited the inevitable expansion of petitioners and that lithopone was forced upon them. (Tr. 1400-1410.)

INCREASED COSTS.

As alternative to their claim for loss of profits, petitioners proved that they were forced to purchase lithopone at a cost of $18,400 more to their business in the years 1946, 1947, 1948. (Tr. 1035-1038.) This, the Appellate Court held, was not proof of injury since it was not proved that this increased cost was not passed off to petitioners' customers. The same theory was rejected in claiming increased costs due to the price fixing and delivered price zone conspiracies. Petitioners claim that the 1949 price increase was

clearly non-competitive and that they were clearly injured in this year when titanium pigment prices went up and their paint prices dropped. (Tr. 1292, 1293, 1133, 1134.) This price rise times their purchases came to an estimated increase in cost of $2,507.50. It was urged that damages from the uniform delivered price zone system could be measured by the freight advantage which National Lead possessed over du Pont of approximately $10.00 a ton (Tr. 1397-1399) times the purchases of titanium from National Lead by petitioners (Tr. 1442, 1288-1291). This sum came to the approximate amount of $1,733.00.

Although the District Court and the Appellate Court both assumed the existence of the conspiracies alleged, neither discussed the issue as to whether or not petitioners were at least entitled to nominal damages, costs and attorney fees.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below is in direct conflict with this Court's decisions in *Bigelow v. R.K.O.*, 327 U.S. 251 and *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359. In the *Bigelow* case, this Court has held that there is a right to have competition in the distribution of commodities. It was further held that upon the showing of a conspiracy to distribute a commodity which discriminated against a plaintiff and prevented him from competing with others for a preferred position or status that there was an invasion of a right which had a natural tend-

ency to cause injury. The Ninth Circuit, however, has ruled in the instant case that the *Bigelow* decision does not apply to a manufacturing company.

In the *Eastman Kodak Co.* case this Court has held that a plaintiff need only prove injury to that portion of his business affected by taking away a product he otherwise might have received absent a monopolistic plan. The Court further held that it makes no difference if the total business of the plaintiff made more money during the period of the plan than it did prior to its commencement. It further said that a business need only approximate damages by establishing gross profits between years of restraint and years of non-restraint, and estimating expenses which may be attributable to increased operations. Clearly, the evidence presented by petitioners was sufficient to have prima facie established injury to their business under the principles announced in these cases. Only by taking into consideration petitioners' entire business, whether or not related to the purchase of titanium from respondents, could the Courts below conclude that petitioners achieved a ~~higher~~ lower net profit in the year 1949. The proof of injury required by the Court below was either met by the evidence or was so technical as to defeat the pronouncements of this Court in the *Bigelow* case that the constant tendency of the Courts is to find some way in which damages can be awarded where a wrong has been done.

2. The questions before the Court are of extreme importance in the enforcement of the antitrust laws. The opinion below sets a dual standard of proof of in-

jury; one applicable to motion picture exhibitors and one applicable to manufacturing companies. The *Bigelow* decision, thought by the antitrust bar to establish the principles of injury and damages in private suits, has now been clouded by a decision which calls for almost impossible standards of proof. The decision below is of great importance in the private antitrust field which is an adjunct of the enforcement of such laws. See *Bruce's Juices v. American Can Co.*, 330 U.S. 743.

3. This Court has never settled the so-called "passing-off" doctrine. The use of the "passing-off" doctrine to this case exhibits a tendency *not* to award damages where a wrong has been done. It has never, until now, been applied to a situation where a conspiracy forces the use of a substitute. There is no precedent for it. It is elementary damage law that the increased cost of a substitute material is a recoverable damage. (McCormick, Damages, § 42, Sedgwick, Damages, § 2269.)

The "passing-off" doctrine as applied to increased costs resulting from purchasing price fixed commodities has precedent in the "oil jobber cases." *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F2d 747 (8th Cir.); *Northwestern Oil Co. v. Socony Vacuum Oil Co.*, 138 F2d 967 (7th Cir.); *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F.Supp. 569, 148 F2d 580. This Court did not review these cases, so that this federal issue remains unsettled. Further, the application of these decisions to the instant case is novel. In these cases a jobber had been granted a guarantee of his margin of

profit. Further, he was selling the same article as was price fixed by the defendants. This is the first known time that the doctrine has been applied to a manufacturer who does not resell the very same article. The application of "passing-off" doctrine to the instant case is, in fact, in probable conflict with the decision of this Court in *City of Atlanta v. Chattanooga Foundry and Pipeworks,* 203 U.S. 390, where the Court held that the mere purchase of a price fixed commodity at increased prices caused the purchaser injury. At 203 U.S. 396, Justice Holmes stated:

> "It was injured in its property, at least, if not its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. * * *"

In this regard the decision of the Ninth Circuit is in conflict with the case of *Thomsen v. Union Castle Mail Co.* (2d Cir. 1908), 166 Fed. 251, which held—if party is coerced into paying sums of money in excess of reasonable rates, he is damaged within the meaning of the antitrust laws to the extent of the sum so paid. Clearly the use of the "passing-off" doctrine, heretofore thought dead and buried, see Comment 18 Univ. of Chicago Law Rev. 130, 61 Yale Law Rev. 1010, at 1023, is an important development in the private antitrust field and ought to be settled by the Court.

4. This Court has likewise never settled the important question as to whether or not upon the showing of a conspiracy which has a certain economic effect of

causing injury, the plaintiff is entitled to at least nominal damages. In such a situation, the fact of injury has been proven and it is only the difficulty in ascertaining damages that stands in the way of recovery. It is traditional doctrine that in such instances, nominal damages should be awarded the complaining party. McCormick, Damages, §§ 95-96. It is certain that a conspiracy which deprives a manufacturer of an essential ingredient and causes his competitive displacement in a period of free and ready sales has caused that manufacturer injury. Upon proof of capacity to have processed additional paints and upon proof of ability to operate at a profit it would seem that the fact of injury in the instant case has been proven.

5. The Court below obviously has departed from the accepted and usual ruling that inferences from the evidence favorable to a non-suited party must be ruled in his favor. The Court below suggested that the evidence was not convincing to them. (Appendix B, page xvii.) But this is opposed to the rule that evidence on a nonsuit need not be convincing but only be such that reasonable men would reach differing conclusions as set forth by this Court in *Wilkerson v. McCarthy* (1949), 336 U.S. 53. The Court below, it is submitted, drew inferences from the evidence adverse to petitioners, refused to accept the evidence of petitioners and made assumptions from the evidence which only a jury should properly have made. Thus the statements of the Court at pages xiv-xv of the opinion, Appendix B, infra, were clearly met by petitioners. At pages xi [redacted] of the opinion, op cit, the

Court makes assumptions as to the effect of petitioners' evidence. This is in conflict with *Story Parchment v. Paterson Parchment Paper Co., et al.*, 282 U.S. 555, where it was held that an appellate court could not assume what would have occurred to a business absent a conspiracy.

The Court has clearly departed from the accepted and usual rules on determining a nonsuit ruling.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 19, 1955.

Respectfully submitted,
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Of Counsel.

(Appendices A, B, C, D and E Follow.)

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Appendix A

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Pro-*

vided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4, Clayton Act

Oct. 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 26

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Appendix B

United States Court of Appeals
For the Ninth Circuit

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, Individuals and Co-partners Doing Business Under the Name and Styles, "Dutch Paint Co." and "Manning-Mitchell Paint Co.," *Appellants,* vs. NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. DU PONT DE NEMOURS AND COMPANY, INC., et al., *Appellees.*	No. 13,966 Jun. 27, 1955

Upon Appeal from the United States District Court, Northern District of California, Southern Division

Before: DENMAN, Chief Judge; HEALY and MCALLISTER, Circuit Judges

MCALLISTER, Circuit Judge:

This is an appeal from a decree dismissing a private action brought under the antitrust act, and based upon the claim that appellants suffered damage as the result of appellees' conspiracy to restrain trade and to fix prices.

The background of the controversy is as follows: After World War II, the government instituted certain programs designed to help returning veterans get started in business. To the Civilian Production Administration was confided general charge of the plan for allocation of scarce materials to such veterans during the years of post-war shortages. With respect to veterans who desired to enter the paint manufacturing business, the above Administration had charge of planning the allocation of titanium pigment, a product made from ilmenite ore, and used in the manufacture of paints, paper, rubber, ceramics, and other products. By far the largest producers of titanium pigment in the United States are appellees, E. I. du Pont de Nemours and Company and the National Lead Company.

Having ascertained that the supply of titanium pigment was in 1946 substantially below minimum requirements, and that the shortage was so serious as to threaten the increased production of peacetime products, the Civilian Production Administration called a joint meeting in February of its Industry Advisory Committee for the titanium pigment and zinc sulphide industries. At this meeting, there was established a veterans' quota program in which it was determined that the industries involved should be required to furnish assured minimum quotas to bona fide veterans entering the paint business.

The evidence discloses that during the years 1947 and 1948, the scarcity of titanium which was under consideration by the Civilian Production Administra-

tion in 1946 continued and, in conformity with the program above mentioned, the producers, including appellee companies, allocated the product manufactured by them to the different paint manufacturers, including veterans who were engaging in the business for the first time.

Among these veterans who were commencing the paint manufacturing business were appellants and their associates who entered the industry in 1946. They had launched their enterprise with an initial capital contribution of $10,000. Within a space of four years, their business had a net worth of $132,000 and, within that time, it had yielded total profits of $392,000, of which $262,000 was paid to them in salaries, bonuses, and partners' drawings, and of which $23,000 was paid out in dividends.

However, in spite of their successful operations, appellants claimed to be injured by the wrongful conduct on the part of appellee companies who were supplying them with titanium. This conduct, they say, consisted of a conspiracy on the part of appellees, who control the sale and distribution of titanium in the United States, to restrict appellants to a fixed and arbitrary supply of titanium and to fix the prices in violation of the Sherman Act; and they alleged that they suffered great injury as a result of such conspiracy. Accordingly, they brought a private antitrust action against appellees under the provisions of the Clayton Act for an injunction and for the recovery of treble damages.

On the trial, the district court, without passing upon the question whether there was proof of a conspiracy, granted appellees' motion to dismiss, on the ground that after an extended hearing in which many witnesses testified and numerous exhibits were introduced in evidence, there was no proof that appellants had suffered injury from any acts or alleged acts of appellees.

On review, appellants contend that they were discriminated against by the allocation of titanium made to them which was a result of conspiracy in restraint of trade. It appears that 1947 and 1948 were years of scarcity during which titanium was allocated to appellants according to a quota. In 1949, there was no longer any shortage of the product and appellants could secure all the titanium they wanted.

The record shows that appellants' net income in each of the three years above mentioned was as follows:

1947	1948	1949
$102,671.60	$154,393.78	$81,784.46

It will be seen from the above that appellants' net profits were much greater in the years 1947 and 1948 when the allocation of titanium was made to them under quota because of scarcity than in 1949 when they could get all the titanium they wanted. In other words, the peak years of appellants' business success were during the time they claimed to be damaged by

appellees' conspiracy. Yet the first year in which they could buy the titanium without restriction, in 1949, their net income dropped and was much less than during the restricted years.

It would seem that if appellants had conducted a more profitable business during the period of scarcity than they did in the subsequent year in which there was no scarcity, they would not have been injured by the shortage or by the allocations made to them. The district court expressed itself as curious as to how appellants were injured by reason of the allocation to them of the scarce materials, when they were making much greater profits during that period than they were making immediately afterward at a time when they could get all the material they desired. Appellants' explanation why they were making greater profits in the years of shortages and quotas was as follows: "During the years of the shortage," appellants' counsel explained to the court, "because they did not have the titanium pigment to make all the paints that the National Lead was making, that du Pont was making, they had to engage in a lot of special business, that is, the purchase of surplus and the remanufacture of purchased surplus products, and a resale of those products, and that is where their profits came from. It did not come from titanium pigments." Counsel thus accounts for appellants' phenomenal success during the years of post-war scarcity, but by what he would appear to consider a rag-tag dealing in odds and ends, and attributes no profit to the very large business they carried on in the manufacture and

sale of titanium paint. Accordingly, appellants, in effect, ask the court to disregard the apparent probative effect of their net profit figures for the three years in question, and to consider only that portion of their business related to titanium pigments, and in this, they seek to have the court isolate the titanium pigment portion of their business and consider it separate and apart from their other operations. In this way, they attempt to establish the fact that they received a higher return on the titanium pigment which they were able to secure in 1949 than upon that which they were able to secure in 1947 and 1948. The claim of appellants that they earned more profits on titanium in 1949 than in each of the two preceding years —and thus were injured by the alleged conspiracy— is based upon what they call their "gross profit on materials handled." This "gross profit" is merely their gross sales less their total purchases. They estimate that the manufactured items containing titanium constituted 42% of their gross sales in 1947, 58% in 1948, and 76% in 1949. They then apply these percentages to their total "gross profit" in those years, and, as a result, show a larger "gross profit" on this part of their business in the year 1949.

Appellants' "gross profit on materials handled" has no probative value. It does not even represent true gross profit. All cost except cost of merchandise sold, is eliminated, including labor, depreciation, maintenance, repairs, and all the other expenses of doing business. The fact that appellants' "gross profits"— or even net profits—on titanium paint might have

increased during the so-called free period of 1949 is not, without taking into consideration other factors in their business operations, proof that they were damaged by the allocation of quotas during the shortage period. If they abandoned or curtailed other lines of production in order to concentrate their efforts and the use of their facilities on titanium paint after the period of shortages, the result would give a completely distorted picture. For the profit in one line of business might have increased only at the expense of the other, rather than because of the abolition of the restricted quotas. The claimed injury of appellants cannot be arrived at by considering the growth of one line of business without making allowance for the diminution of the other. It thus appears that there was no real comparison made by appellants between their operations in 1949 and those in the preceding years. For a multitude of factors was missing which might have accounted for the difference in their profits, not the least being different costs of operations for the different periods, as well as the abandonment or curtailment of certain operations in some years in favor of others for different years.

In any event, "gross profits" for the various years is no criterion of injury in this case. For the only way of ascertaining whether the business was more profitable in one year than another is by comparing the net profits for one year with another—and this would apply even were only the titanium paint operations considered. Appellants' use of so-called "gross profit on materials handled" has no probative value

in proving injury claimed to have been suffered by the conduct of appellees. "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 562.

Appellants refer to *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 266, in support of their claim that a comparison of their operations for the different years in the manner above outlined constituted proof of injury and damages. In the Bigelow case, petitioners owned a moving picture theatre in Chicago. Some of the respondents were distributors of films; others owned or controlled theatres. Petitioners charged that by reason of an unlawful conspiracy, they were prevented from receiving pictures for exhibition until after preferred exhibitors had been able to show them in earlier and more desirable runs, and that petitioners were thus discriminated against in the distribution of feature films, in favor of competing theatres owned or controlled by respondents. It appears that after the introduction, in 1937, of the practice of showing double features, petitioners were no longer able to secure films which had not had a prior showing; and they charged that, as a result of respondents' unlawful acts, they had suffered a loss of earnings during a five-year period subsequent thereto. To establish their damage, they introduced two classes of evidence. The first was a comparison

of earnings during the above mentioned five-year period, of petitioners' theatre, with those of a comparable theatre of respondents, which showed a difference of $116,000 in favor of the latter. The second class of evidence was a comparison of the receipts of petitioners' theatre for the five years following 1937, with the receipts for four years immediately preceding, which showed a decline aggregating more than $125,000. The jury returned a verdict of $120,000, which was trebled by the court. On review, the Supreme Court held the evidence sufficient to sustain the verdict, saying: "The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

We are of the view that the Bigelow case is completely inapplicable to the facts in the controversy before us, and that the district court correctly distinguished the case on two grounds: that the evidence in that case established the fact of damage; and that there was relevant data and a proper basis upon which the estimate of the amount of damages could be supported, which was not the fact in the present controversy. In the Bigelow case, it was a comparatively

simple problem to estimate probable profits. As said of a similar situation, involving damages for inability to obtain first-run pictures, in *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, 107, aff. 164 F. 2d 1021 (C.A. 3), the court stated: "With this background to start with, we must determine whether the evidence in the case is sufficient to supply a basis for estimating probable profits with the degree of accuracy which the law requires. * * * In dealing with the question, it should be kept in mind that the motion picture business is in many respects unique. Certainly, the problem of estimating its probable return is very different from that presented in the case of a manufacturing business. In a sense, it is much simpler." The court then went on to particularize: "Of the three major factors, cost, prices and volume, the first two can be predicted with very much greater accuracy than in the ordinary industry or business. As to costs, rental is usually fixed or ascertainable, wages and salaries do not constitute a major part of operating costs and items like advertising service, electricity, maintenance and repair are within limits ascertainable. Film rental, the largest factor in costs, is usually on a percentage basis and consequently bears a constant ratio to receipts. At any rate, in the present case, the parties are in substantial agreement as to what would have been the cost of operating the Erlanger during the damage period. As to prices, wide and unpredictable fluctuations need not be expected, and in the present case the evidence shows that the charges for admissions at the first-run theatres during

the damage period were quite stable." The instant case, dealing with a manufacturing business, is so completely different from the motion picture business with regard to estimating its probable return that the rule used in the latter cases is completely inapplicable to a manufacturing business.

In the light of the circumstances heretofore discussed, the Bigelow case is, in our view, no guide in the case before us.

Moreover, aside from the fact that the method of gross profits used by appellants is not a criterion of injury in this case, appellants are foreclosed from recovery because of other considerations. In the first place, they assume that they would have received larger quantities of titanium except for the alleged conspiracy; but there is no evidence that they would have, or that they were entitled to larger quantities than they actually received. They further assume, without proof, that the conditions of supply and demand in titanium pigments were the same in 1949 as in preceding years; and they likewise assume, without evidence, that the market conditions for paints were the same. In addition, there is no evidence that they would have manufactured and sold more paint in 1947 and 1948 if they had received greater amounts of titanium pigment. It appears that other pigments could be, and were, used as substitutes for titanium; and appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact, they purchased immense quantities of one of such substitutes, litho-

pone, in 1948, buying 403,050 pounds of it in that year. They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone. It is true that appellants claim that lithopone was not a fair equivalent of titanium pigment as it cost considerably more; and it appears that they paid $18,400 more for it during the period in controversy than they would have spent for a comparable quantity of titanium pigment. However, if they passed this extra cost on to their customers, it would not result in any reduction in their profit; and there is no evidence that they did not pass it on. It is to be said that appellants also contend that the quality of their paint was lowered by the necessity of using lithopone rather than titanium; but there is no proof that they failed to sell any part of their paint production at a profit. Their great financial success during the years of shortages when they were using the large quantities of lithopone in their paints indicates the contrary. This is, in all probability, accounted for by the fact that, in the period of shortage, the public wanted the paint at appellants' price, whether it was made with titanium or lithopone.

As to the claimed price fixing conspiracy, there is no proof that appellants sustained any injury as a result of appellees' conduct or alleged conduct. Even assuming that appellees were engaged in such a conspiracy, there is no evidence that prices were fixed at a higher level than would have been the competitive

price, in the absence of price fixing, and that they were damaged by paying the higher prices, and lacking such evidence, there would be no proof of injury. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U. S. 156. If appellants did not absorb such increase in price but passed it on to their customers, they could not recover in a treble damage action brought under the antitrust act. *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F. 2d 747 (C.C.A. 9), cert. den. 314 U. S. 644. In *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F. 2d 967, 971 (C.C.A. 7), cert. den. 321 U. S. 792, where, in a treble damage action brought by a jobber of gasoline based on a conspiracy to raise the tank car price of gasoline, the trial court had directed a verdict for defendant on the ground that there was no proof of injury to plaintiff, Judge Lindley, speaking for the Court of Appeals in affirming the district court, said that "* * * the Clayton Act does not permit recovery by plaintiff in causes such as this for unlawful prices as such but authorizes recovery only of pecuniary loss to property or business. * * * Inasmuch as plaintiff has wholly failed to prove any loss to its property or business but rather has shown, by all reasonable inferences, that the increased cost of which it complained was passed on to the ultimate consumer, the court rightfully directed a verdict for defendant." "It has now been settled in the so-called treble damage oil cases, arising out of the conspiracy referred to, that a jobber of gasoline is not entitled to recover damages merely because there has been an increase in price of the gasoline bought as the result of the conspiracy, but he must affirmatively establish

a pecuniary loss to his business and property by reason of such excessive payments. * * * Clearly, where the person who has paid an excessive price has been able to pass on the increased cost to the ultimate consumer, he cannot recover." *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569, 572, 574 (D.C. Minn.), affirmed 148 F. 2d 580 (C.C.A. 8), cert. den. 326 U. S. 734.

An examination of the contentions advanced by appellants that they could not have passed on the increased costs to their customers is unconvincing.

The district court, in dismissing the case on the ground that appellants had failed to show any injury from the conduct of appellees, observed that the years of shortage, 1947 and 1948, had been a profitable period in the business of appellants; and that in the year 1949, in a period of non-shortage, when there was an abundance of material, the appellants conducted a less profitable business, and with this background, proceeded to analyze the complicated claims of appellants. It observed that in attempting to establish that they were injured by appellees, appellants had sought to use the proofs of the amount of material purchased by them in 1949 as a gauge to evidence the fact that if they had had more of that material in the years in which it was short, they would have been able to make more profit during that period. The court then commented upon the fact that the evidence showed the appellants to have been newcomers to the industry; that all who had participated therein, with varying exceptions, had been limited in

their supplies during the period of shortage; that appellants had received their share of a short material and conducted a prosperous business from the beginning, and thereby had received a benefit in a competitive industry that they might never have received had they entered it in a period of unlimited supply and free competition; that these circumstances were illustrative, in part, of the completely speculative nature of the evidence as to any hurt or damage claimed to have been suffered; and that to submit the case to the jury would, in its opinion, be to give judicial blessing to a decision based upon speculation, surmise, and conjecture.

We concur in the views which were expressed by the trial court in dismissing the case. Appellants failed to prove injury resulting from the conduct of appellees.

The judgment of the district court is affirmed.

(Endorsed:) Opinion. Filed Jun. 27, 1955.
Paul P. O'Brien, Clerk.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, Individuals and Co-partners Doing Business Under the Name and Styles, "Dutch Paint Co.," and "Manning-Mitchell Paint Co.," *Appellants,* vs. NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. DU PONT DE NEMOURS AND COMPANY, INC., et al., *Appellees.*	No. 13,966

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered and adjudged by this court that the appellees recover against the appellants for their costs herein expended and have execution therefor.

(ENDORSED) Judgment
Filed and entered: June 27, 1955
PAUL P. O'BRIEN, Clerk.

Appendix D

NET INCOME OF MANNING-MITCHELL PAINT COMPANY AND PREDECESSORS FOR THE CALENDAR YEARS 1947 THROUGH 1949*

(Prepared from PX 17; R. 1418-1426)

The income of Manning-Mitchell Paint Company, a partnership, and its predecessor companies (corporations) has been allocated to calendar years on a basis authorized by the Bureau of Internal Revenue for determining taxable income.

The recapitulation which follows is supported by the analysis set forth in succeeding pages:

Year	Net Income
1947	$102,671.60
1948	154,393.78
1949	81,784.46

Since appellants are attempting to draw a comparison between the so-called "free" year of 1949 and prior years, when they were allegedly under restriction, a more accurate comparison would be to add, on a pro rata basis, the federal income and state corporate taxes (as shown by PX 17) to the years 1947 through 1948. Appellants paid no such taxes in 1949 because they did not employ the corporate form.

*Source: Appendix C, Brief of Appellee National Lead Company.

Year	Net Income	Federal Income and State Corporate Taxes[1]	Total Net Income on a Comparable Basis
1947	$102,671.60	$ 18,188.68	$120,860.28
1948	154,393.78	7,655.17	162,048.95
1949	81,784.46	—	81,784.46

[1]See PX 17, R. 1418, 1421.

NET INCOME FOR CALENDAR YEAR 1947 AFTER FEDERAL INCOME AND STATE CORPORATE TAXES

(Exhibit References are to Plaintiffs' Exhibit 17)

(1) Exhibit B (R. 1418) shows a net income for Manning-Mitchell Inc. for the year ending November 30, 1947 of $15,529.48.	
11/12ths of this allocated to 1947 =	$ 14,235.35
(2) Exhibit B (R. 1418) shows a net income for Manning-Mitchell Inc. for the 5 months ending April 30, 1948 of $4253.05.	
1/5th of this allocated to 1947 =	850.61
(3) Exhibit D (R. 1421) shows a net income for Manning-Mitchell Paint Company, a corporation, for the year ending April 30, 1947 of $2215.21.	
4/12ths of this allocated to 1947 =	738.40
(4) Exhibit D (R. 1421) shows a net income for Manning-Mitchell Paint Company, a corporation, for the year ending April 30, 1948 of $33,069.36.	
8/12ths of this allocated to 1947 =	22,047.24
(5) In order to put the net income of the two corporations in 1947 on a comparable basis with the net income of the partnership in 1949, it is necessary to add back to the corporate income the amounts of salaries and bonuses paid to appellants and their associates in 1947. Exhibit G (R. 1426) shows the total of these salaries and bonuses to be	64,800.00①
Net Income for 1947	$102,671.60

①These salaries and bonuses appear under two captions in Exhibit G: "Administrative and Executive" and "Chemist". The four persons falling within these categories were appellants Wolfe and Dannenfelser, and their associates, Brez and Mueller.

NET INCOME FOR CALENDAR YEAR 1948 AFTER FEDERAL INCOME AND STATE CORPORATE TAXES

(1) Exhibit B (R. 1418) shows net income for Manning-Mitchell Inc. for the 5 months ended April 30, 1948 of $4253.05. 4/5ths of this allocated to the first four months of 1948	= $	3,402.40
(2) Exhibit D (R. 1421) shows net income for Manning-Mitchell Paint Company, a corporation, for the 12 months ended April 30, 1948 of $33,069.36. 4/12ths of this allocated to the first four months of 1948	=	11,023.12
(3) Exhibit F (R. 1424) shows net income for Manning-Mitchell Paint Company (partnership) for the 12 months ended April 30, 1949 of $94,051.15. 8/12ths of this allocated to the last eight months of 1948	=	62,700.76
(4) Exhibit G (R. 1426) shows the salaries and bonuses paid to appellants and their associates during the first 4 months of 1948 (the corporations were dissolved on April 30, 1948) to be		51,600.00
(5) Write-up of inventory to market price on date of corporation liquidation, April 30, 1948		25,667.50[1]
Net Income for Calendar Year 1948		$154,393.78

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[1] Exhibit A (R. 1417) shows the inventory of Manning-Mitchell, Inc., as of April 30, 1948 as $13,279.71

Exhibit C (R. 1420) shows the inventory of Manning-Mitchell Paint Co. as of April 30, 1948 as 32,433.99

Total $45,713.70

Exhibit E (R. 1423) shows that the inventory of Manning-Mitchell Paint Co., the partnership, as of May 1, 1948, amounts to 71,381.20

Write-up of inventory on date corporations were liquidated $25,667.50

NET INCOME FOR CALENDAR YEAR 1949
(Partnership)

(1) Exhibit F (R. 1424) shows a net income for Manning-Mitchell Paint Company (partnership) for the 12 months ended April 30, 1949 of $94,051.45.	
4/12ths of this allocated to the first four months of 1949	= $ 31,350.38
(2) Exhibit F (R. 1424) shows a net income for Manning-Mitchell Paint Company (Partnership) for the 12 months ended April 30, 1950 of $75,651.12.	
8/12ths of this allocated to the last eight months of 1949	= $ 50,434.08
Net Income for Calendar Year 1949	$ 81,784.46

Appendix E

	Net Profit Based on Respondents Figures (Corporate Bonus Added to Net Profits)[1]	Net Profit Based on Petitioners Figures (No bonus add back)
Elimination of Business Activity not based on pigment purchased from Respondents[3]	1947—$43,121 1948—$74,661 1949—$68,027[2]	1947—$15,906 1948—$44,733 1949—$68,027[2]
Elimination of Business Activity above, and further elimination of Lithopone purchase[4]	1947—$21,561 1948—$31,997 1949—$68,027[2]	1947—$ 7,853 1948—$19,032 1949—$68,027[2]

[1]These figures include adding back corporate bonuses but exclude corporate liquidation inventory write-up, $25,667 in 1948.

[2]The deduction of legal expenses for the year, 1949, occasioned by a lawsuit ought to be added back to net profits. This sum is $8,162.77 (Tr. 1424). This would increase 1949 net profits to $76,186.

[3]Only 42% of petitioners' business in 1947, 58% in 1948 and 76% in 1949 was based on processing titanium pigment received from respondents. Accordingly net profit figures and corporate bonuses are adjusted by these percentages.

[4]Titanium and lithopone were mixed on a 1 to 1 basis in 1947, a 3 to 4 basis in 1948 and only titanium was used in 1949. Accordingly net profit figures are further adjusted by these percentages.

Office - Supreme Court, U.S.
FILED
NOV 18 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 480

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, individuals and co-partners, doing business under the names and styles "Dutch Paint Co." and "Manning-Mitchell Paint Co.",

Petitioners,

vs.

NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. DUPONT DE NEMOURS & CO., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL LEAD COMPANY

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OCTOBER TERM, 1955

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL LEAD COMPANY

Opinion Below.

The opinion of the Court of Appeals is reported at 225 F. 2d 427. It is also printed as Appendix B of the petition. The opinion of the District Court is unreported and appears at R. 1315-1319.

Jurisdiction.

Petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254(1).

The judgment of the Court of Appeals was entered on June 27, 1955. A petition for rehearing was denied on August 22, 1955.

The District Court's jurisdiction was based on the Clayton Act, 15 U. S. C. §§ 15, 26. The jurisdiction of the Court of Appeals rested on 28 U. S. C. § 1291.

Statement of the Case.

The questions set out in the petition assume certain facts which are not supported by the record, ignore other pertinent facts which were incontrovertibly established below, and misconstrue the import of the decision of the Court of Appeals.

Petitioners brought suit to recover treble damages for a claimed injury to their paint manufacturing business resulting from an alleged conspiracy in restraint of trade (R. 4). Unlike the situation in the usual treble damage action, petitioners' business enjoyed its greatest prosperity during the period of supposed restraint.

Respondents manufacture, among other products, titanium pigments which are used in the formulation of certain types of paints. Titanium pigments are in direct competition with other "white" pigments—white lead, zinc oxide, and lithopone (PX 94, R. 1655-57).

Petitioners claimed that their business was injured, during the period 1946-1949, through an alleged conspiracy on the part of respondents (1) to establish a "quota" system for the distribution of titanium pigments which discriminated against veterans such as petitioners and favored respondents' "historical" customers and their own paint plants; and (2) to fix prices for titanium pigments at "exorbitant" noncompetitive levels.

Not one of these claims was supported by the evidence. Indeed, the evidence failed to establish any one of the three elements essential to petitioners' case—conspiracy, injury, or measurable damages. And, of course, it was incumbent

upon petitioners to prove a prima facie case as to all three before a triable issue could arise.

The District Court dismissed the complaint and the Court of Appeals affirmed on the ground that there had been a total failure of proof of injury to petitioners (R. 1315-19, 225 F. 2d at 433-34). Neither court found it necessary to decide the question whether there was sufficient evidence to warrant submission of the case to the jury on the issue of conspiracy. The District Court clearly stated, however, that if the question had to be decided, it would have held petitioners' proof deficient on the issue of conspiracy as well (R. 1317). Under the circumstances, there is no warrant in assuming, as petitioners do, that respondents violated the anti-trust laws and that the only question in the case is whether injury was proved. On the contrary, the issue of violation is an important element in the review of this case.

(1) The claim of conspiracy.

Despite the fact that during the years 1945-1948 respondents and the other two domestic manufacturers of titanium pigments all greatly increased their production (PX 1, R. 1373-74), titanium pigments, like a host of other products, were in short supply.

Because of this shortage, both the Government and respondents were impelled, during and after the war, to take steps to allocate the available supplies of titanium pigments.

In December, 1941, the Office of Production Management (OPM) issued an order requiring manufacturers of titanium pigments to set aside a certain amount of their production for war purposes and to distribute the balance in accordance with a formula based upon the average monthly purchases by customers over a preceding period of 12 months (R. 1754-65). The shortage which occasioned the issuance of this order was short-lived and from the spring of 1942 until approximately the middle of 1943 titanium pigments were in relatively free supply (R. 697).

The later shortage in 1943 was largely caused by the increased demands of the armed services for titanium pigments. It therefore became necessary for each respondent to distribute its available pigment for civilian uses upon some allocation method. Each respondent adopted its own separate, distinct, and different method of allocation for civilian purchasers of pigment (R. 580-87, 666, 668-89, 698-700, 702-05, 724-27, 783-88, 897-904, 1775-78).

Following the end of hostilities, the Government instituted a number of programs designed to give veterans a preferred status in the civilian economy. The War Foods Administration first established oil quotas for veterans (R. 731-33, 1013-14). Allocation of "white" pigments, however, came within the purview of the Civilian Production Administration (CPA), the successor of WPB (Ex. Order 9638, 10 F. R. 12591).

Acting pursuant to Priorities Regulation 28 (R. 1766), CPA in February, 1946, called a meeting of its Industry Advisory Committee for titanium pigment and established assured *minimum* quotas for eligible veterans desiring to enter the paint business (R. 203, 211, 907, 908, 916, 1766, 1790). The titanium pigment veterans' quota was based upon the formula adopted by War Foods Administration in its oil quota program and each of the four manufacturers of titanium pigments was required (as a minimum) to supply a certain stated percentage of the veterans' quota for each veterans organization which qualified under the criteria established by CPA (R. 1771-72). The pigment manufacturers were at perfect liberty, however, to supply any amounts in excess of these quotas as each might see fit (R. 916).

When petitioners purchased a paint manufacturing plant in May, 1946 they obtained an oil quota from War Foods Administration, and later obtained titanium pigment quotas from respondents (R. 1054-55, 1086-87, 1542-43). DuPont's quota equalled the required minimum established by CPA, while National Lead's was in excess of that amount (*id.*).

During 1946, shipments of titanium pigments to petitioners by each respondent exceeded the minimum required under the CPA veterans' quota plan (R. 1442, 1659).

In January, 1947 Priorities Regulation 28 was amended to eliminate veterans' quotas and other preferences for veterans business organizations (R. 1779). Following this, each respondent in 1947 and 1948 shipped petitioners titanium pigments substantially in excess of the quotas which had been established under the CPA program.[1]

To substantiate their charge of price fixing petitioners relied exclusively on the claim that prices were uniform—by itself an insufficient indicium of a price agreement. What is more, they failed in their proof. Despite the fact that titanium pigments are fungible chemical products, respondents' prices differed during a substantial part of the period in controversy and price changes were initiated by both respondents at different times (PXs 6 and 7, R. 1381-95). In short, there was no uniformity and there was no pattern of price leadership.

(2) The claim of injury.

Petitioners entered business in 1946 with an initial capital contribution of $10,000. Within the space of approximately four years, this mushroomed into a net equity of $132,000 and yielded total net profits of $392,000. Out of these profits $262,000 was paid to petitioners and their associates in salaries, bonuses and partners' drawings, and $23,000 in the form of dividends (R. 930, 1070-71, 1074, 1418-24; 225 F. 2d at 429).

1947 and 1948 were years of shortgage. 1949 was a year in which petitioners admittedly obtained all the ti-

[1] Under the CPA program each of the respondents was required to supply petitioners with the equivalent of at least 72,000 lbs. of extended (or 30% pure) pigment per year. In 1947 and 1948, however, National Lead supplied petitioners with approximately 220,000 lbs. instead of the 144,000 lbs. which would have been required under the former CPA program. During the same two years, duPont supplied petitioners with approximately 194,000 lbs. (R. 1442, 1659).

tanium pigment they wanted (R. 1132). The record conclusively establishes, and the Court of Appeals determined (225 F. 2d at 429), that petitioners' net income in each of these years was as follows:

1947	*1948*	*1949*
$102,671.60	$154,393.78	$81,784.46[2]

In short, the evidence showed that the petitioners prospered more in 1947 and 1948—the period of alleged restraint—than they did in 1949 when they make no claim of any conspiratorial denial of pigment.

Not only did petitioners during the shortage years receive substantial quantities of titanium pigment from respondents and others, but they were able to purchase large amounts of lithopone, a substitute pigment, and other materials to supplement their titanium purchases.[3]

In addition, petitioners' own evidence established that in 1947 and 1948 they were able to obtain all the substitute pigment, lithopone, and other materials that they needed to manufacture their paint (R. 1147).

There is not even a suggestion that petitioners could have used the large quantities of lithopone and other materials consumed in 1947 and 1948 if they had been able to procure unlimited amounts of titanium pigment. Thus there was no showing that petitioners' inability to obtain all the titanium pigment they wanted in 1947 and 1948 reduced their volume of paint sales.

As for the claim that petitioners spent more to purchase lithopone than they would have for a comparable quantity of titanium pigment, there is no evidence, as the Court below properly held (225 F. 2d at 432), that petitioners themselves absorbed the increased cost instead of passing

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[2] These figures are taken from PX 17, R. 1417-1448, a report by independent certified public accountants introduced in evidence by petitioners.

[3] In 1947 petitioners consumed 116,370 pounds of lithopone, and in 1948, 403,050 pounds (PX 17, R. 1443). They also reprocessed paint and paint materials (R. 1662; Appellants' Brief in the Court of Appeals, p. 52).

it on to their customers as part of the price for their paint. On the contrary, since petitioners reduced their paint prices at the end of 1948 when they began receiving all the cheaper titanium pigment they wanted (R. 1132, 1133), the only reasonable inference is that prior to that time they did include the increased cost of lithopone in their price for the finished product.[4]

With respect to the claim of injury resulting from price fixing, petitioners' complaint charged that as a result of the alleged conspiracy they were compelled to pay an excessive, non-competitive price for titanium pigments (R. 34). However, there is not a scintilla of evidence in the record that petitioners paid respondents more than the competitive price for titanium pigment or that the prices of either respondent were higher than those of other producers of such pigment not charged with participating in the alleged conspiracy. Indeed, the record discloses that petitioners paid jobbers of titanium pigments higher prices than the current prices charged by either respondent (R. 1063-64, 1066). And petitioners admitted that titanium pigments are cheaper than competitive pigments (R. 1036, 1037, 1040). Finally, petitioners offered no evidence that they themselves absorbed the alleged higher prices instead of passing them on to their customers.

This was the evidence that led to the concurrent determinations of the two courts below that petitioners had failed to prove any injury to their business or property.[5]

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[4] Petitioners contend that the quality of their paint was lowered by the necessity of using lithopone rather than titanium. However, as the Court of Appeals pointed out, "there is no proof that they failed to sell any part of their paint production at a profit. Their great financial success during the years of shortages when they were using the large quantities of lithopone in their paints indicates the contrary". (225 F. 2d at 432.)

[5] Petitioners' case was defective on still another score. Instead of offering evidence containing relevant data from which a jury could make a just and reasonable estimate of the amount of damages, petitioners engaged in pure guesswork. As the District Court aptly stated, to submit the case to the jury would be "to give judicial blessing to a decision based upon speculation, surmise, and conjecture" (R. 1319; Petition, Appendix B, p. xviii). In view of petitioners' total failure to establish the fact of injury, however, it is not necessary to point out the many arbitrary and speculative assumptions on which their damage calculations were predicated.

Questions Presented.

Stripped to essentials, the petition seeks a second full dress appellate review of the facts in this case. The decision below presents no novel question of law or conflict with any decision of this Court. The truth of the matter is that the "Questions Presented", as set out in the petition, are not in fact raised by this record.

Argument.

(1) There was no proof of conspiracy.

There was no proof that respondents conspired to establish a quota system restricting petitioners to an arbitrary amount of titanium pigments. The record shows that in 1946, when titanium pigment was in short supply, the Government adopted a veterans' quota program that required respondents and other producers to furnish petitioners with an assured minimum quantity of pigment; that respondents fully complied with this program; that beginning in 1947, after termination of Government priority assistance to veterans, each respondent individually and voluntarily elected to continue to supply petitioners with increasingly large amounts of pigments, despite the unprecedented demand from thousands of well-established customers; and that the amounts so furnished by each respondent not only differed from, but were substantially in excess of, what petitioners would have been entitled to had the Government program remained in effect (*supra*, pp. 4-5).

Petitioners' complaint really boils down to the contention that they failed to receive from each respondent out of increased production the same proportionate amounts of pigment as respondents' own paint plants and certain other accounts. But the law is clear that each respondent, acting independently, had the right to dispose of its product among its various customers, including its own paint plants,

in accordance with its best business judgment.[6] The antitrust laws neither require a seller to divide its product on proportionately equal terms among its customers, nor preclude a seller from supplying itself with its own products.[7] See *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, 573 (1924); *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36-37 (9th Cir. 1923); *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951 (2nd Cir. 1951), cert. denied 342 U. S. 926 (1952). Petitioners' proofs on this branch of the case merely showed that respondents individually supplied different and varying amounts of pigment to their respective customers. There was a total failure to prove any concert of action.

Nor was there any proof that respondents conspired to fix prices. Prices are fixed when they are agreed upon. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222-23 (1940). Far from adducing evidence of such an agreement, the witnesses called to the stand by petitioners testified that the rise in the price of each respondent during the post-war inflation was the product of independent business judgment (R. 626-27, 890-91). All that petitioners endeavored to prove was price uniformity in the case of a fungible article. In this they failed (PX 6, PX 7, R. 1381-95). But even if they had succeeded, proof of uniformity, by itself and without more, would not have established the price-fixing which they claimed.[8]

While petitioners prefer to *assume* that respondents engaged in an unlawful conspiracy, consideration of that mooted issue cannot be avoided since absence of conspiracy,

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[6] Petitioners conceded in their brief below that respondent National Lead's surplus production "was distributed by National Lead *as it saw fit*" (Appellant's Brief in the Court of Appeals, pp. 19, 81) (emphasis supplied).

[7] It is to be noted that at no time during the period in suit did National Lead's paint plants consume more than 3.7% of the company's titanium pigment production (PX 1, R. 1373-74; PX 3, R. 1376).

[8] *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1925); *U. S.* v. *Int. Harvester Co.*, 274 U. S. 693 (1927); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 369 (8th Cir. 1949), cert. denied 339 U. S. 942 (1950).

apparent from the record, is an independent ground upon which the decision below can be sustained. *Langnes* v. *Green*, 282 U. S. 531, 535-39 (1931); *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947).

(2) There was no proof of injury.

The first question set forth in the petition implies that the decision below is inconsistent with *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946). There are three critical differences between *Bigelow* and the case at bar:

(a) In *Bigelow*, the fact of injury was established by competent evidence. Here, the record affirmatively establishes the absence of any injury.

(b) In *Bigelow*, the fact of injury having been established, the sole question considered by the Court was whether the proof as to the amount of damages was sufficient. Here the fact of injury was never shown.

(c) In *Bigelow*, the defendants did not challenge the finding that they had conspired in violation of the antitrust laws. Here, there is no proof or finding of any such conspiracy.

Far from disclosing any error in the decision below, comparison of the two cases makes clear why Bigelow succeeded and why petitioners must fail.

By reason of the defendants' concerted action, Bigelow's Jackson Park theatre had been relegated to exhibiting motion pictures on a later run than it had enjoyed previously. This Court specifically pointed out that there was proof in the record that a prior run theatre possesses competitive advantages over subsequent run theatres because of its greater capacity to attract patronage and its ability to charge higher admission prices (327 U. S. at 260). This was confirmed by the fact that the receipts of the Jackson Park were approximately $125,000 less during the period

of proven restraint than in preceding years when it had an earlier playing position (327 U. S. at 258). There was thus abundant proof that the Jackson Park had in fact been injured as a result of the defendants' conduct. The controversy in this Court concerned whether the estimates of the quantum of damages sustained by the Jackson Park were sufficiently reliable to justify the verdict. The Court held that they were.

In marked contrast, petitioners in the case at bar failed to show any injury. Whereas Bigelow's earnings were demonstrably lower during the operative period of the conspiracy than they had been previously, petitioners enjoyed their greatest prosperity in the very years for which they claim damages. It was only in 1949, when the shortage had ended and there concededly was no conspiracy, that petitioners' business suffered a slump. Its net profits in 1949 were $81,784.46 as compared with $154,393.78 in 1948 and $102,671.60 in 1947 (*supra*, p. 6). Both in the District Court and the Court of Appeals petitioners conceded, in effect, that unless their earnings in the "free" year 1949 were higher than they were in the preceding years of alleged restraint, there would be no proof of injury (R. 1299-1300; Appellants' Brief in the Court of Appeals, p. 104).[9] This is merely a recognition of the obvious fact that if petitioners conducted a more profitable business during the period of scarcity than they did in 1949, they could hardly have been injured by any alleged restriction. That is precisely what happened here.

Petitioners' claim that they earned more money in 1949 —and hence were injured by the alleged conspiracy—was predicated solely on an exhibit purporting to show, not their net profits, but so-called "gross profit on materials handled" (PX 98, R. 1661-62). To arrive at this self-styled "gross profit", they simply deducted the cost of their total

[9] Petitioners' brief stated: "The year 1949 reflects, reasonably and properly, what appellants would have sold and earned in any given market." (Appellants' Brief in Court of Appeals, p. 104).

purchases of materials from their gross sales. This concept was obviously invented to meet the exigencies of the present case, is sanctioned by no accepted method of accounting and is completely devoid of probative value on the issue of injury. As stated by the Court of Appeals: "It does not even represent true gross profit.[10] All cost except cost of merchandise sold is eliminated, including labor, depreciation, maintenance, repairs and all the other expenses of doing business" (225 F. 2d at 430).

Petitioners also contend that the decision below is in conflict with *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927).

The *Eastman Kodak* case is clearly distinguishable. In that case there was no question about the fact of injury; it was not disputed that the defendant there had been guilty of an attempt to monopolize in the course of which it had completely cut off the plaintiff. The issue there concerned the rules governing *measure* of damages (see 273 U. S. at 376), not the fact of injury.

Nothing in *Eastman Kodak* justifies petitioners' attempt to segregate their "titanium" business from the rest of their paint business in computing their profits (Petition, pp. 9, 14). The plaintiff in *Kodak* was engaged in the sale of two separate and distinct lines of goods purchased by different categories of consumers, and there was proof that neither line conflicted with the other (273 U. S. at 376).[11] Here, the contrary is true. During the shortage period petitioners did a flourishing business in the sale of reprocessed paints. According to petitioners' brief below, these alternative sources of revenue accounted for approximately 50% of their total profits in the years of scarcity

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[10] Petitioners' accountant Reardon conceded as much at the trial (R. 1163).

[11] Kodak had monopolized the field of photographic materials used by professional photographers, and the plaintiff, a dealer in such goods, could obtain them only from the defendant (273 U. S. at 376). The plaintiff was permitted, therefore, to recover for injury to that distinct segment of its business.

(Appellants' Brief in the Court of Appeals, p. 52). When titanium pigment became freely available in 1949, petitioners curtailed their production of reprocessed paints in order to concentrate their efforts on the manufacture and sale of titanium paints. At the same time they virtually discontinued the use of lithopone as a substitute pigment. Manifestly, since petitioners were able to exploit their line of titanium paints only at the expense of their other paint lines, there is no warrant for measuring their profits solely in terms of the growth of one aspect of their business without making any allowance for the regression of others. Under these circumstances the Court of Appeals was clearly correct in holding that the net profits from petitioners' entire paint manufacturing operation were the only meaningful data with which to evaluate their claims of lost profits (225 F. 2d at 430-31).

The simple fact is that petitioners' inability to obtain all the titanium pigment that they wanted in 1947 and 1948—which was in no way connected with any alleged conspiracy but was simply the inevitable result of the law of supply and demand—caused them no injury whatever. Admittedly, they obtained all the substitute pigment they needed, and it is clear that they sold at a substantial profit all the paint they could make.

Since it appears that the alleged higher cost of lithopone was passed on to petitioners' customers (*supra*, p. 7), petitioners could not possibly have been injured by their use of this substitute pigment. Moreover, petitioners had the burden of proving that they did not pass on this extra cost as part of the price for the finished product. *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (8th Cir. 1941), cert. denied 314 U. S. 644 (1941); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1943), cert. denied 321 U. S. 792 (1944); *Clark Oil Co.* v. *Phillips Petroleum Co.*, 56 F. Supp. 569, 572, 574 (D. Minn. 1944),

aff'd 148 F. 2d 580 (8th Cir. 1945), cert. denied 326 U. S. 734 (1945).[12]

This same doctrine disposes of petitioners' claims of injury resulting from the alleged price fixing conspiracy, since there was no proof that petitioners themselves absorbed the alleged higher prices that they claimed to have paid for titanium pigment. Furthermore, the fact that there was no evidence that respondents' prices were in fact higher than competitive prices constitutes an independent ground for dismissing petitioners' claims. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906) aff'g 127 Fed. 23, 27 (6th Cir. 1903); *American Sea Green Slate Co.* v. *O'Halloran*, 229 Fed. 77, 80 (2nd Cir. 1915).[13]

This is not a case in which the Court of Appeals, in reviewing the dismissal of a complaint for lack of proof, failed to view the evidence in the light most favorable to the plaintiffs. On the contrary, its opinion shows that the Court carefully scrutinized the record and gave petitioners the benefit of every permissible inference. It nevertheless concluded, and properly so, that there was a complete absence of proof of injury, and hence no warrant for submitting the case to the jury.

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[12] Petitioners are in error when they suggest that this Court has not reviewed the "passing on" doctrine. The very genesis of the doctrine was this Court's decision in *Keogh*. Nor is the Court's earlier decision in *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906), to the contrary. In that case a municipal corporation engaged in operating a waterworks recovered the difference between an excessive fixed price and the reasonable value of certain water pipe which it had purchased from the defendants. Since the city was not in the business of reselling water pipe, but was the ultimate consumer, there was and could be no question of "passing on". The language of Mr. Justice Holmes that "A person whose property is *diminished* by a payment of money wrongfully induced, is injured in his property," is entirely consistent with the fundamental rationale of the "passing on" cases, namely, that there must be a diminution in the plaintiff's property. Manifestly, there can be no diminution unless the plaintiff himself absorbs the increased price.

[13] The decision below can be sustained not only on the ground that there was no evidence of either conspiracy or injury, but on the further ground that there was a complete failure to prove measurable damages.

In question 5 petitioners suggest that even though "the proof as to damage is conjectural" they should nevertheless be entitled to "nominal" damages as well as attorneys' fees (Petition, p. 3; see also Petition, p. 13). No authority is cited for this proposal. Moreover, it rests upon the hypothesis that conspiracy and injury were both proved, contrary to the fact.

Conclusion.

The Court of Appeals correctly held that petitioners adduced no evidence tending to establish an indispensable element of their case, namely, that they had been injured as a result of respondents' alleged violation of the anti-trust laws. And had the issue of violation been reached, the court below would have been obliged to hold petitioners' case deficient on that score as well.

The only questions presented for review are factual. The case does not conflict with any decision of this Court or of any Court of Appeals. Nor does it raise any important question of federal law warranting review.

Respondents therefore respectfully urge that the petition be denied.

November 17, 1955.

Respectfully submitted,

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